

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-7104

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
DAVID E. ROLF,

Plaintiff-Appellant-Cross-
Appellee,

v.

BLYTH, EASTMAN DILLON & CO., INC.
and MICHAEL STOTT

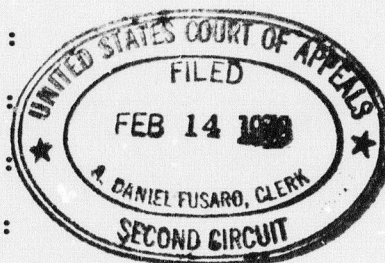
Defendants-Appellees-Cross-
Appellants,

and

AKIYOSHI YAMADA,

Defendant.
-----x

Docket No. 77-7104



BPLS

BRIEF OF BEAR, STEARNS & CO., SHEARSON
HAYDEN STONE INC., AND LOEB RHOADES, HORN-
BLOWER & CO., AMICI CURIAE, IN SUPPORT OF
PETITION FOR REHEARING OR, ALTERNATIVELY,
SUGGESTION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID E. ROLF,	:	
Plaintiff-Appellant-Cross-	:	
Appellee,	:	
v.	:	
BLYTH, EASTMAN DILLON & CO., INC.	:	Docket No. 77-7104
and MICHAEL STOTT	:	
Defendants-Appellees-Cross-	:	
Appellants,	:	
and	:	
AKIYOSHI YAMADA,	:	
Defendant.	:	

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BRIEF OF BEAR, STEARNS & CO., SHEARSON
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Bear, Stearns & Co., Shearson Hayden Stone Inc.,
and Loeb Rhoades, Hornblower & Co. (collectively referred to as
the "Brokers") are all broker-dealers engaged in the securities
brokerage business throughout the United States. As a group,
the Brokers service literally thousands of customers daily,
performing a wide range of activities in the securities market-
place, including the execution of innumerable orders to purchase
and sell a wide variety of securities for their customers, both

directly and on the instructions of investment advisors who have full discretionary authority to manage customers' accounts. As a result, any decision which has an effect on the infrastructure and interaction of the various elements of the securities industry, of which they are an integral part, has a substantial impact upon the Brokers.

The majority opinion in this case is just such a decision, for it introduces several new significant legal concepts to the operation of the securities industry which will have a substantially adverse effect. More particularly, the majority has first determined that simply the purchase of "unsuitable" securities can give rise to Rule 10b-5 liability. Given the fact that the term "suitable" is so highly subjective when used to evaluate (often in hindsight) any specific security, such a standard of liability imposes an unconscionable and unworkable responsibility upon broker-dealers. In addition, a broker-dealer could be held liable to a customer as an "aider and abetter" by reason of its execution of transactions in allegedly "unsuitable" securities, as directed by an investment advisor with sole discretionary authority, and its expressions of confidence in such advisor, based on such advisor's then excellent reputation.

Finally, the majority had delineated a damage standard which would impose liability upon a broker-dealer, irrespective of whether its conduct bears a direct relationship

either to the alleged wrongdoing of the principal or to the actual realized loss suffered by a customer.

The result is the creation of a new "rule of law", whereunder the broker is given the impossible task of trying to evaluate continuously and fully not only the competence of various independent investment advisors but also the apparent "suitability" of literally thousands of securities. If in fact this duty is imposed, such that brokers must refuse to effect transactions for customers through an investment advisor until they have completely reviewed not only each discrete security transaction in detail, but also the capabilities of the relevant investment advisor, it would, as this Court concluded in Lanza v. Drexel & Co., 479 F.2d 1277, 1308 (1973), "create an intolerable situation."

Consequently, we embrace the dissent of Judge Mansfield as stating the more appropriate standard for aider and abettor liability, and support the petition of defendants Blyth Eastman Dillon & Co. Incorporated and Michael Stett. We respectfully suggest that the Court reconsider in banc this new "rule of law", since it would impose such an extensive duty upon brokers and their respective representatives.

CONCLUSION

For the foregoing reasons as well as those set forth in the petition of defendants-appellees-cross appellants, Brokers respectfully urge that this Court grant the

petition for rehearing or, alternatively, the suggestion for rehearing in banc be granted.

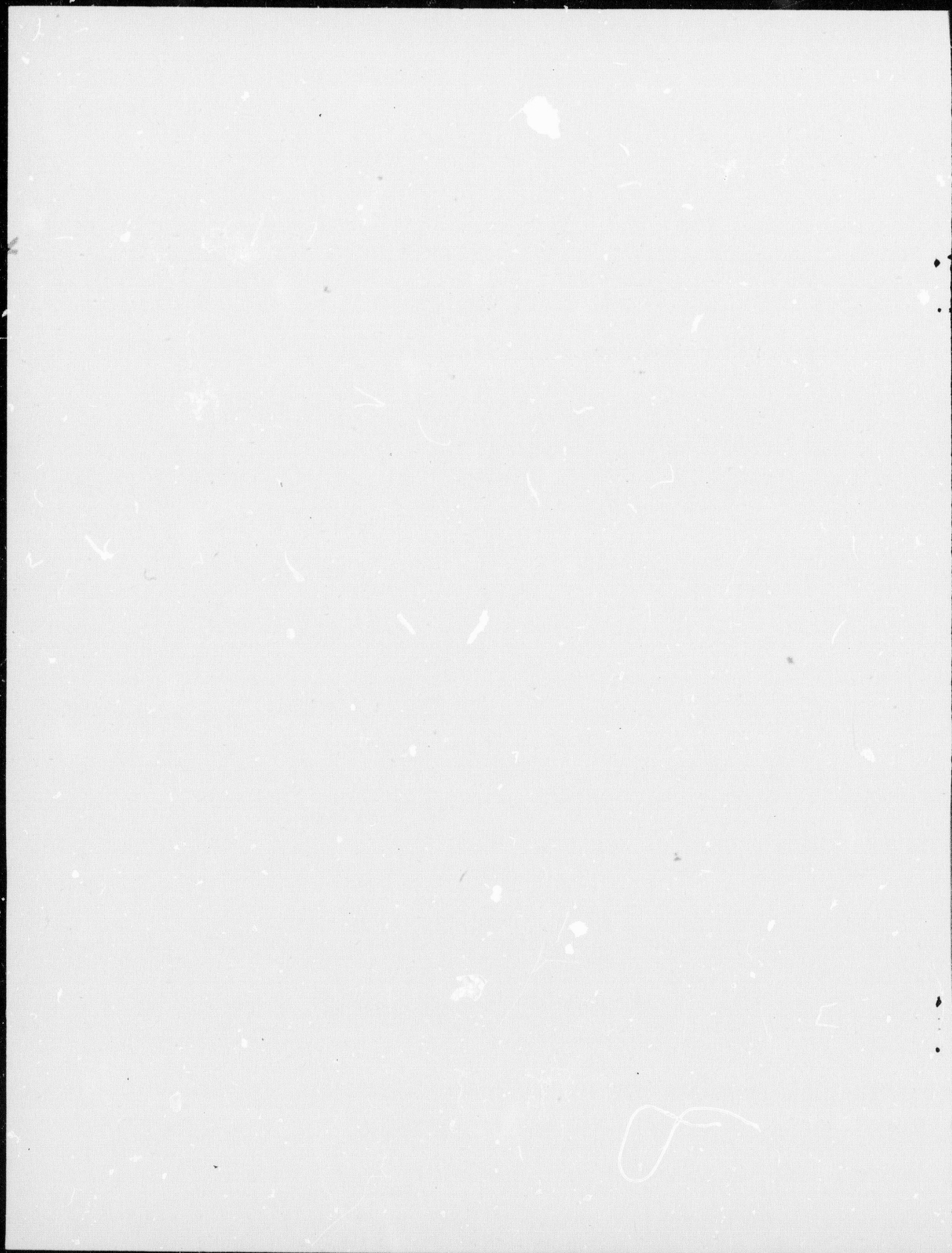
Dated: New York, New York
February 1, 1978

Respectfully submitted,

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-against-

BLYTH, EASTMAN DILLON & CO., INC.
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Defendants-Appellees-Cross-Appellants,

and

AKIYOSHI YAMADA,

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AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

E. SHERRELL ANDREWS, being duly sworn, says: I am
employed in the office of Breed, Abbott & Morgan, One Chase
Manhattan Plaza, New York, New York 10005.

On February 1, 1978, I served the annexed Notice of
Motion, Affidavits, and brief Amici Curiae on behalf of Movants,
Bear, Stearns & Co., Shearson Hayden Stone Inc., and Loeb
Rhoades, Hornblower & Co. by depositing true copies thereof in
a sealed, postpaid envelope at the post office box maintained
at 421 Eighth Avenue, New York, New York 10001, addressed to
the following:

- | | |
|---|--|
| 1. Daniel Fusaro, Esq.
Chief Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007 | 2. Breed, Abbott & Morgan
One Chase Manhattan Plaza
New York, New York 10005 |
| | 3. Silverman & Harnes
75 Rockefeller Plaza
New York, New York 10019 |

Sworn to before me this
1st day of February, 1978

Edna G. Watrous
EDNA G. WATROUS
NOTARY PUBLIC, State of New York
Notary No. 248115

Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

E. Sherrell Andrews
E. Sherrell Andrews